

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
JOHNSON CREEK WATER USERS  
ASSOCIATION,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,  
and FRANKLIN A. HERRIMAN

Respondent.

PCHB No. 79-183

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

THIS MATTER, the appeal of a Department of Ecology order granting to Franklin A. Herriman a permit to appropriate public ground waters, having come on regularly for formal hearing on the 20th day of March, 1980 in Wenatchee, Washington, and appellant Johnson Creek Users Association, appearing by its attorney, Richard B. Price, and respondent Department of Ecology, appearing through its attorney, Wick Dufford, and respondent Franklin A. Herriman, appearing and representing himself, with William A. Harrison, hearing officer

1 presiding, and the Board having considered the exhibits, records and  
2 files herein, and having reviewed the Proposed Order of the presiding  
3 officer mailed to the parties on the 23rd day of April, 1980, and more  
4 than twenty days having elapsed from said service; and

5 The Board having received no exceptions to said Proposed Order and  
6 the Board being fully advised in the premises; NOW THEREFORE,

7 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Proposed  
8 Order containing Findings of Fact, Conclusions of Law and Order dated  
9 the 22nd day of April, 1980, and incorporated by reference herein and  
10 attached hereto as Exhibit A, are adopted and hereby entered as the  
11 Board's Final Findings of Fact, Conclusions of Law and Order herein.

12 DATED this 21<sup>st</sup> day of May, 1980.

13 POLLUTION CONTROL HEARINGS BOARD

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16 NAT W. WASHINGTON, Chairman

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18 DAVID AKANA, Member

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PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal of a Department of Ecology order granting to Franklin A. Herriman a permit to appropriate public ground waters, came on for hearing before the Pollution Control Hearings Board, William A. Harrison, Hearing Examiner, presiding alone at Wenatchee, Washington on March 20, 1980. Respondent elected a formal hearing pursuant to RCW 43.21B.230

Appellant appeared by its attorney Richard B. Price. Respondent Department of Ecology appeared by Wick Dufford, Assistant Attorney

EXHIBIT A

1 General. Respondent Franklin A. Herriman appeared and represented  
2 himself.

3 Witnesses were sworn and testified. Exhibits were examined. From  
4 testimony heard and exhibits examined, the Pollution Control Hearings  
5 Board makes these

#### 6 FINDINGS OF FACT

##### 7 I

8 This case concerns land divided into 20 acre tracts and situated  
9 north of Omak. In the early 1960's as part of the original  
10 development, a well was drilled on the land to provide domestic water  
11 to the tracts. No permit under the Public Ground Water code, chapter  
12 90.44 RCW, was sought or obtained for the construction of that well.

13 Because of uncertainty as to who was to maintain the well, the  
14 residents of the tracts formed the Johnson Creek Water Users  
15 Association in 1976 for the purpose of operating the well and a  
16 private water system. Respondent, Herriman, was one of the residents  
17 who formed the Water Users Association. That well will be referred  
18 to, hereafter, as the Association well.

##### 19 II

20 On June 2, 1978, respondent Herriman applied to respondent, State  
21 Department of Ecology (DOE), for a permit to withdraw public ground  
22 water from a well to be constructed on Herriman's tracts. The  
23 Herriman well would be approximately 1/2 mile south-southeast of the  
24 Association well. Although Herriman applied for group domestic (4  
25 homes) and irrigation use, DOE ordered a permit for only the group  
26 domestic use, in the amount of 1 acre/foot per year.

1 From this order appellant, Association, appeals. The Association  
2 does not request reversal of the order approving Herriman's group  
3 domestic permit. Rather, it seeks a condition within the permit that  
4 Herriman's right shall be subject to non-interference with withdrawals  
5 from the Association well in the amount of 75 gallons per minute.

6 Subsequent to the Herriman application, the Association applied to  
7 DOE for a permit authorizing it to make group domestic withdrawal from  
8 its well in the amount of 4 acre/feet per year for service of 15  
9 homes. The Association currently serves 12 homes from its well. The  
10 DOE has ordered approval of the Association application.

### 11 III

12 The Association and Herriman wells would draw from the same  
13 unconfined aquifer, although the Herriman well cannot be expected to  
14 draw down the water level of the Association well.

15 The aquifer in question is not recharged significantly by any  
16 source other than precipitation. The drainage area serving the  
17 aquifer is approximately 2 square miles. Precipitation in the area  
18 averages 10 inches per year yielding 1066 acre feet per year within  
19 the drainage area. Of this, 10% can be expected to penetrate the soil  
20 to recharge the aquifer. Thus a little more than 100 acre feet per  
21 year is available for aquifer recharge.

22 Of this, 83 acre feet per year are accorded to appropriations by  
23 third parties leaving 17 acre feet per year. Herriman's 1 acre foot  
24 per year now at issue would thus leave 16 acre feet per year to  
25 accommodate withdrawals from the Association well while its current  
6 and proposed withdrawal is no more than 4 acre/feet per year.

IV

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Board comes to these

CONCLUSIONS OF LAW

I

The criteria for determining whether respondent Herriman's permit should issue are found at RCW 90.03.290 as applied to ground water by RCW 90.44.050. The criteria set forth there are:

1. that there is water available
2. for appropriation for a beneficial use
3. and the appropriation thereof as proposed will not impair existing rights or
4. be detrimental to the public welfare

Herriman's permit, as ordered by DOE, meets these criteria and that permit should be issued.

II

The permit condition which appellant, Association, requests, and which would confine Herriman to non-interference with withdrawal of 75 gallons per minute from the Association well, is inappropriate. Such a condition constitutes regulation of one appropriator in respect of another. Where, as here, there is no showing that one appropriation will, or probably will, physically impair another, such regulation is unauthorized. This can be seen in the language of RCW 90.44.130 which states that a prior appropriator

" . . . shall enjoy the right to have any withdrawals by a subsequent appropriator of

1 ground water limited to an amount that will  
2 maintain and provide a safe, sustaining yield  
in the amount of the prior appropriation."

3 Appellant, Association, has not shown that it will be denied a  
4 safe, sustaining yield in the amount of its prior appropriation as a  
5 consequence of the permit which DOE ordered for Herriman, and is  
6 therefore not entitled to any limitation within the permit or  
7 otherwise.

8 III

9 Because there is no showing in this case of physical impairment,  
10 or the probability of it, we do not reach the question of whether or  
11 not or to what extent appellant, Association, is entitled to  
12 protection as a prior appropriator. Nothing herein shall be deemed a  
13 determination of that question.

14 IV

15 Any Finding of Fact which should be deemed a Conclusion of Law is  
16 hereby adopted as such.

17 From these Conclusions the Board enters the following

18 ORDER

19 The order of Department of Ecology granting a public ground water  
20 appropriation permit to Franklin A. Herriman is hereby affirmed.

21 DONE at Lacey, Washington this 22<sup>nd</sup> day of April, 1980.

22 POLLUTION CONTROL HEARINGS BOARD

23 

24 WILLIAM A. HARRISON  
25 Presiding Officer